NO. 88-411

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,

v.

JOSEPH M. GIARRATANO, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

1.Did the Fourth Circuit, sitting *en banc*, err in holding (a) that the District Court's findings of fact, supporting its conclusion that Virginia's Death Row inmates are deprived of meaningful access to the courts to pursue state habeas corpus remedies, were not clearly erroneous, and (b) that the District Court's remedy of requiring that legal representation be provided prior to, rather than following, the filing of state habeas corpus petitions did not constitute an abuse of discretion?

LIST OF PARTIES

The plaintiffs in the proceedings below included Joseph M. Giarratano, Johnny Watkins, Jr., Richard T. Boggs and a class certified by the District Court, comprised of

> all persons, now and in the future, sentenced to death in Virginia, whose sentences have been or are subsequently affirmed by the Virginia Supreme Court and who either (1) cannot afford to retain and do not have attorneys to represent them in connection with their post-conviction proceedings, or (2) could not afford to retain and did not have attorneys to represent them in connection with a particular post-conviction proceeding.

847 F.2d 1118, 1120 (4th Cir. 1988). The description of the class in the Petition (at p. 2) is incomplete.

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STATEMENT OF THE CASE

This is a particularly fact-bound case limited to the unique circumstances of Death Row prisoners pursuing post-conviction proceedings in Virginia. The United States District Court for the Eastern District of Virginia (Hon. Robert R. Merhige), meticulously following the directions that this Court enunciated in *Bounds v. Smith*, 430 U.S. 817 (1977), found as a fact that Respondents' distinctive situation severely disables them from obtaining access to the courts in a timely and meaningful manner. Accordingly, the District Court determined that Virginia should modify its existing *Bounds* remedy to provide Death Row inmates with legal representation prior to, rather than following, their filing of state habeas corpus petitions. The court noted that its decision "requires only a slight modification of the current assistance." 668 F. Supp. at 515.

The Fourth Circuit affirmed, *en banc*, holding that the District Court's findings were not clearly erroneous and that its limited remedy did not constitute an abuse of discretion. The Fourth Circuit's decision does not conflict with any decision of this Court, or the decision of any other Court of Appeals: The Fourth Circuit is the first federal appellate court to examine the access to post-conviction remedies that any state provides for its Death Row prisoners.

I. THE CRISIS IN VIRGINIA

This case arose when Virginia attempted to execute an unrepresented, mentally retarded Death Row inmate who, because he could not afford a lawyer, was unable to institute state habeas corpus proceedings. (Tr. 198-200)[1] Earl Washington, who had just completed the direct review of his death sentence, asked a Virginia Circuit Court judge to appoint a lawyer to help him file a

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[1] "Tr. ___" refers to the transcript of the two-day trial before the Honorable Robert R. Merhige; "Px __" or "Dx __" refers to exhibits offered at this trial.

state habeas petition. The judge denied Mr. Washington's motion and, in the same order, scheduled his execution. (Px 22; Tr. 199)

Mr. Washington's only hope for living to begin his post-conviction proceedings lay in somehow finding (and convincing) an attorney to take his case without pay. In Virginia, a Death Row inmate searches for volunteer counsel by asking fellow Death Row inmate Joseph Giarratano to contact Marie Deans of the Virginia Coalition on Jails and Prisons. (Tr. 261-63) Ms. Deans, the Executive Director and sole staff person of the Coalition, formed this organization in 1983 in response to the crisis that had developed in Virginia Death Row representation: "Nobody in Virginia seemed to know who was [on Death Row] and who had attorneys and where they would get attorneys if they needed attorneys." (Tr. 186) Ms. Deans therefore began to monitor Virginia's Death Row, and attempted to find lawyers for the inmates who needed them.

The Commonwealth itself has come to rely exclusively on Ms. Deans and her recruiting efforts as Virginia's "system" of legal assistance for Death Row inmates. James Kulp, Virginia's Senior Assistant Attorney General and "Coordinator of all Capital Litigation in the Commonwealth," explained:

> Q. Now, what happens after a certiorari lawyer who has been doing this case for free tells you he is not able to handle it anymore? What do you do?
>
> A. In the past I have been calling Marie Deans. Or she has called me, one or the other.
>
> Q. What do you tell her?
>
> A. I said, are we going to have somebody represent this person? And she says, yes, we are looking. And at times she has difficulty, but she has had people and we have dealt with them . . ..

(Tr. 449-50; *see also* Tr. 319, 320, 321, 344, 346, 419, 420, 442, 449-50) Since late 1984, however, Ms. Deans has experienced increasing difficulty in locating volunteers to represent Virginia's indigent Death Row inmates:

> Where I had been recruiting attorneys five days a week, from 9:00 to 5:00 or 6:00, I began to have to recruit attorneys seven days a week for 12 or 14 hours a day. We were coming down to deadlines with no attorneys. The attorneys were more and more resistant to taking the cases, and it just seemed like we had sort of moved through Virginia and taken that for whatever was there. I started having to go further and further afield. I went from Virginia all the way up the East Coast looking for attorneys.

(Tr. 191; *see also* Tr. 94, 263-64, 325; Px 14)[2]

When Ms. Deans began looking for a lawyer for Mr. Washington (while simultaneously searching for lawyers for four other Death Row inmates), she found that the supply of volunteer lawyers was exhausted:

> I contacted over a hundred attorneys. I contacted the D.C. pro bono bar, the Legal Defense Fund, the Southern Prisoners Defense Committee, attorneys in Georgia, if you believe that. Attorneys in South Carolina, attorneys in North Carolina. All the way up through New York. I went to large firms, I went to anybody.

(Tr. 193-94; Px 1) Nobody would take Mr. Washington's case.

Other people and organizations, including the N.A.A.C.P. Legal Defense Fund and the American Civil Liberties Union, began scrambling to find someone to represent Mr. Washington. Eventually, even United States District Judge Robert R. Merhige, in response to a letter from Death Row, began soliciting attorneys. (Tr. 36-37, 270; Px 14, 21)

Finally, only a week before Mr. Washington's scheduled date of execution, counsel in this action stepped in and prepared an

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[2] The burden of undertaking this representation on a volunteer basis is extraordinary. Capital post-conviction cases are a tremendous financial drain on attorneys, both because of the hundreds of hours of time involved and the out-of-pocket expenses. (Tr. 47, 88-89, 142-44, 156-57, 162, 176, 185, 189-90; Px 3)

emergency petition for writ of habeas corpus. A few days before Mr. Washington was to be electrocuted, he obtained a stay of execution. (Tr. 198-99, 204)

Mr. Kulp admitted at the trial below that, even though Virginia was aware that Mr. Washington was desperately but unsuccessfully seeking a lawyer to help him begin habeas proceedings, the Commonwealth would have electrocuted him absent a stay:

> Q. If you didn't hear from Mr. Washington, you . . . were going [to] execute him whether he had a lawyer or not, isn't that correct?
>
> A. The order would have been carried out I am sure.
>
> Q. The order of execution?
>
> A. That is correct.

(Tr. 443; *see also* Tr. 450-51)

The representatives of the plaintiff class were similarly unable to obtain legal representation. At the time of the trial in this action, one year after the Virginia Supreme Court had affirmed the conviction and death sentence of Plaintiff Richard A. Boggs, Mr. Boggs still had no lawyer to help him begin state habeas corpus proceedings. (Tr. 202) Plaintiff Johnny Watkins, Jr., after a full year in the same predicament, had only recently obtained a volunteer lawyer. (Tr. 119, 197-98) Both men had previously searched for four months for volunteer counsel to prepare petitions for writ of certiorari to this Court. (Tr. 197, 202) Had it not been for the pendency of this lawsuit, they too would likely have faced execution before they could commence post-conviction proceedings. As Mr. Kulp testified, "[i]f Mrs. Deans calls and says we don't have any counsel, we can't get any counsel . . . we are obviously not going to sit there from now to doomsday waiting on somebody to do something." (Tr. 450-51)

The circumstances of Messrs. Washington, Boggs, and Watkins typify those of indigent inmates on Virginia's Death Row. (Tr. 191-202; Px 1) It has taken Ms. Deans more than a year to find counsel for some inmates. (Tr. 193-204; Px 1) Other inmates, such as Wilbert Evans, obtained volunteer lawyers only days before scheduled dates of execution. (Tr. 134-135) Ms. Deans was

unable to find a lawyer at all to prepare two of three petitions for certiorari for Syvasky Poyner (Tr. 264), and James Briley completely lost the right to petition this Court for writ of certiorari for the same reason. (Tr. 35) In addition, at the time of trial, there were five men who would shortly need post-conviction counsel. Ms. Deans had no idea how she would find them lawyers. (Tr. 204-05)

These Death Row inmates want to begin post-conviction proceedings, and they need lawyers to help them. Such proceedings are extraordinarily important because more than half of those Death Row inmates who do get into court (by virtue of legal representation) succeed in having their death sentences vacated. (Tr. 11)[3] Yet at the point when the inmate should begin these vital proceedings -- and when he is suddenly, and for the first time, placed in jeopardy of immediate execution -- the Commonwealth withdraws representation. He is left to proceed *pro se*.

II. THE PROCEEDINGS BELOW

At trial, the District Court heard testimony from 17 witnesses, including two who qualified as experts on capital post-conviction proceedings, four other attorneys who had represented Virginia Death Row inmates in such proceedings, four attorneys responsible for counseling inmates in Virginia prisons, and two Virginia Death Row inmates. Based on this evidence, the District Court found that Virginia's Death Row inmates are incapable of using prison law libraries to pursue post-conviction remedies; that the system of legal assistance provided to Death Row inmates by Virginia is inadequate; and that volunteer attorneys are no longer available to carry the Commonwealth's burden.

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[3] In concurring in the denial of Plaintiff Johnny Watkins, Jr.'s petition for writ of certiorari on direct appeal, Justice Stevens acknowledged that there had been a clear constitutional violation at Mr. Watkins's murder trial, but decided to "allow the error to be corrected in collateral proceedings." *Watkins v. Virginia*, 106 S.Ct. 1503 (1986).

A. Death Row Inmates Are Incapable of Proceeding *Pro Se* in Post-Conviction Proceedings

The District Court first analyzed the capability of Death Row inmates to use the Virginia prison law libraries to pursue *pro se* their post-conviction remedies in Virginia courts meaningfully and effectively. It found, from uncontradicted testimony, that they cannot. This finding was based on the interplay of three specific factors: (1) "the complexity and difficulty of the legal work itself"; (2) "the limited amount of time death row inmates may have to prepare and present their petitions to the courts"; and (3) the fact that "an inmate preparing himself and his family for impending death is incapable of performing the mental functions necessary to adequately pursue his claims." 668 F. Supp. at 513. These findings are well-founded in the record and in common sense.

One of Respondents' expert witnesses, an attorney who has represented 60 to 80 Death Row inmates and significantly assisted in the representation of 200 to 300 others (Tr. 10), testified that he had never known a Death Row inmate who was capable of representing himself. (Tr. 31-32) He explained:

> In matters of legal research, capital cases are particularly difficult, and although some clients are bright and could understand one stage of a proceeding sometimes, and one facet of the criminal law, very few can integrate the procedural and substantive and the constitutional questions that are needed in order to make accurate assessments of what issues have merit and what don't.
>
> * * *
>
> It is not the case that because one can file one Fourth Amendment claim or one Fifth Amendment confession claim after a great deal of work if one is a bright, unusually bright criminal defendant that one can integrate that [claim] into a series of 8 or 10 or 13 constitutional claims that may need to be presented. In other words, I guess what I am saying is [in] theory there are some Death Row inmates who can articulate one or two constitutional claims if given proper access to legal resources. I have never met one who could adequately prepare an entire petition that lays out a series of claims.

(Tr. 32-33, 59) No contrary evidence was offered.

Few of Virginia's Death Row inmates have any understanding of their rights and remedies following direct appeal. (Tr. 115-18, 262-63, 264, 267-68, 280) Plaintiff Johnny Watkins described his own perplexity:

> Q. Do you know whether your case went to any other courts after the Virginia Supreme Court?
>
> A. I think it went up, it went to another court, but I don't know exactly which one.
>
> * * *
>
> Q. Do you know what court you go to next?
>
> A. No.
>
> Q. Do you know what step you take next to appeal your case?
>
> A. No.

(Tr. 116-17)[4] Nor do these inmates know how to conduct legal research (Tr. 120, 130-31, 267-68); the vast array of substantive legal issues is beyond their grasp. (Tr. 32-33, 59, 266, 275)[5] Moreover, as the law in capital cases is rapidly developing, inmates are not only charged with staying current (Tr. 28, 60), but with anticipating changes in the law. (Tr. 21) A single procedural or substantive mistake by a *pro se* inmate, however, could irreparably

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[4] As one of Respondents' expert witnesses testified, a problem unique to capital cases is the likelihood that, under the pressure of an impending date of execution, an inmate may be litigating in two or even three courts simultaneously. (Tr. 29)

[5] At the one Virginia Death Row institution -- out of three -- where Death Row inmates are permitted to enter the library, they can do so only two times a week (assuming no other Death Row inmates wish to do research) for a maximum of two and one-half hours a visit. (Tr. 398) The prison makes little accommodation for emergencies. (Px 26, 27) At the two other prisons housing Death Row inmates (including the State Penitentiary, where they are confined the final two weeks before their execution), they are *not* permitted to visit the library *at all*. (Dx 3, 5, 11)

prejudice his rights in a way that cannot be repaired later by counsel.[6]

As a second consideration underlying Death Row inmates' inability to litigate *pro se*, the District Court found that they must conduct this complex and sophisticated litigation under severe time constraints. 668 F. Supp. at 513. (*See also* Tr. 22, 31, 86-87, 170-76) Once an execution date is set -- which, in Virginia, can happen "at any time" after affirmance by the Virginia Supreme Court -- the inmate must pursue *all* of his post- conviction remedies in the period prior to that date. 668 F. Supp. at 513.

For example, Death Row inmate Richard Whitley received an execution date immediately after the Virginia Supreme Court rejected his petition for appeal from a denial of state habeas relief. (Tr. 168-71) His volunteer attorney, Timothy Kaine, had one month to assert his claims in federal court. The habeas petition was presented to a district court 21 days before the scheduled execution date. Fifteen days later, and six days before the execution date, the district court dismissed the habeas petition and denied the motions for a stay and for a certificate of probable cause. (Tr. 173-74) Mr. Kaine then flew to Abingdon, Virginia to obtain a certificate of probable cause and stay of execution from a Fourth Circuit judge, accomplishing this four days before Mr. Whitley's scheduled date of execution, after 140 hours of work in a 10-day period. (Tr. 175-76)

Respondents' expert testified, again without contradiction, that the *Whitley* schedule was too often the rule:

> I know plenty of lawyers that have been involved with an execution date facing them and in a 30 or 45 day period before execution who have been unable to get

[6] As pointed out by the Fourth Circuit (847 F.2d at 1120 n.4), an attorney's assistance is "particularly critical in Virginia." Under Virginia law, if an inmate files a petition *pro se* and omits -- through lack of knowledge of the law -- allegations that he could have included, he may be barred from including these allegations in successive petitions, no matter how meritorious his claims may be. Va. Code § 8.01-654(B)(2). Under the doctrine of procedural default, he may then be barred from asserting these claims in federal court. *See Whitley v. Bair*, 802 F.2d 1487 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 1618 (1987).

> stays in court after court. What that typically involves is 30 days of virtual around the clock work. A lawyer will take a case Monday May first and at [the] end of May will have done no other work except litigate in five or six courts.

(Tr. 31) Likewise, attorney Jonathan Shapiro described his frantic struggle to file a first state habeas petition after he took on Wilbert Evans's case (because no other lawyer could be found) just days before Mr. Evans's scheduled execution. (Tr. 134-36) Similarly, Marie Deans related the hectic, night and day efforts counsel devoted for Mr. Washington. (Tr. 198-99) A Death Row inmate could hardly be expected to do so much for himself in so little time.[7]

Finally, as a third consideration, the District Court found that even if Death Row inmates had the legal skills and time to pursue post-conviction remedies *pro se*, their mental and emotional states would nevertheless render them incapable of proceeding on their own. 668 F. Supp. at 513. As one of Respondents' experts explained, based on 10 years of experience:

> Finally, and I think that is perhaps unique to capital inmates in my experience, the prospect of facing death or having to come to terms with an execution date or a date certain for one's demise is [a] seriously enough involving and challenging emotional and personal crisis that even an inmate who was a law graduate and who otherwise had the capability to do legal and factual research, probably does not have the detachment and dispassion to litigate under those circumstances. I have had lots of clients in those last 60 day time periods, and what they are forced to do is to prepare themselves mentally and spiritually and emotionally to deal with their

[7] The fact that some inmates have managed to survive on Death Row for an extended period of time is attributable solely to the fact that these inmates *did have lawyers*. Had Petitioners had their way, Mr. Washington would have perished less than four months after certiorari was denied on his direct appeal. In all likelihood, class representatives Johnny Watkins and Richard Boggs would not have lived much longer. (*See* Tr. 449-51)

family and their children, all of whom see them as about to die. And that is a full time job.

And very few of them, I think, even have the emotional resources to talk with you meaningfully at that point about their case. Much less to take it over.

(Tr. 33-34)

Other witnesses testified, also without contradiction, about individual inmates whose mental and psychological conditions prevented them from assisting their attorneys -- much less proceeding *pro se*. Attorney Robert Hall said of his client, James Clark:

A. Clark was sometimes cooperative and sometimes not. It was difficult to tell which of the Clark's you were dealing with from day-to-day.

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Q. Did Mr. Clark ever indicate that he thought this evidence was important?

A. Mr. Clark was virtually unaware in hi present mind of most of this.

(Tr. 77, 84) Death Row inmate Joseph Giarratano, testifying from a particularly close perspective, described two fellow Death Row inmates: "Mr. Closa was in a strip cell on suicide watch. There was no way he could help himself. He was highly sedated with hypotrophic drugs." (Tr. 267) As for Death Row inmate Syvasky Poyner:

A. Mr. Poyner didn't even know where he was at.

Q. What do you mean by that?

A. He doesn't understand what is happening or that he is going to be killed.

(Tr. 264) No contrary evidence was offered.

From this and other unrefuted testimony, the District Court found that "the plaintiffs are incapable of effectively using lawbooks to raise their claims. Consequently, the provision of a library does little to satisfy Virginia's obligation to 'assist inmates in the preparation and filing of meaningful legal papers' with

respect to Virginia death row prisoners. *See Bounds*, *supra*, 430 U.S. at 828, 97 S.Ct. at 1498. Accordingly, Virginia must fulfill its duty by providing these inmates trained legal assistance. *Id.*" 668 F. Supp. at 513.

B. The Commonwealth's Provision of Attorneys for Post-Conviction Proceedings Is Inadequate

Having found that Virginia's Death Row inmates could not adequately represent themselves, Judge Merhige turned to the question whether Virginia provides adequate legal assistance for post-conviction proceedings. He found the two alleged forms of such assistance -- part-time, counseling lawyers appointed to Virginia prisons under Va. Code § 53.1-40, and the possible availability of court-appointed attorneys under Va. Code § 14.1-183 -- insufficient to meet the constitutional requirements of *Bounds v. Smith*.

1. The Institutional Attorneys Do Not, and Cannot, Provide Legal Representation in Capital Post-Conviction Cases

As the District Court found: "The scope of assistance these attorneys provide is simply too limited. The evidence indicated that they do not perform factual inquiries of the kind necessitated by death penalty issues. They act only as legal advisors or, to borrow the phrase of one such attorney, as 'talking law books'." 668 F. Supp. at 514.

These attorneys -- who consider themselves to be no more than adjuncts of prison law libraries -- do not appear in court; do not serve as counsel of record; do not perform factual investigations; do not devote more than a few hours to any one inmate; and do not necessarily draft pleadings. (Tr. 224, 227, 301, 330, 356, 376, 387; Px 12, Dx 3 at 2) Seven such lawyers, all of whom additionally have full-time private practices, are responsible for advising almost 2,000 inmates. (Tr. 220-21, 223, 231-32, 297, 304-06, 311-12, 314, 364-365, 371, 393-94)

Not one of these lawyers has *ever* drafted a petition for writ of certiorari or a petition for writ of habeas corpus on behalf of a Death Row inmate. (Tr. 227, 229, 307-08, 319, 386-87) Indeed, requests for such legal assistance by Death Row inmates (including Syvasky Poyner, Johnny Watkins, Joseph Giarratano, and Richard Boggs) have been firmly -- and uniformly -- rejected. (Tr. 120-23, 262, 264-65, 267-69, 270, 272-73, 277-78, 341-48, 353, 457; Px 25)

Judge Merhige correctly assessed the possibility that the assistance offered by institutional attorneys could provide Death Row inmates with access to the courts for post-conviction proceedings:

> For death row inmates, more than the sporadic assistance of a "talking lawbook" is required to enable them to file meaningful legal papers. With respect to these plaintiffs, the Court concludes that only the continuous services of an attorney to investigate, research, and present claimed violations of fundamental rights provides them the meaningful access to the courts guaranteed by the Constitution.

668 F. Supp at 514.

2. The Possibility of Obtaining Court-Appointed Counsel is Insufficient to Secure the Rights of Death Row Inmates

The District Court, "[h]aving determined that the assistance of institutional attorneys falls short of [the constitutional] requirement" 668 F. Supp at 514, considered the likelihood of securing court-appointed attorneys pursuant to Va. Code § 14.1-183. After analyzing the statute and its operation, Judge Merhige found:

> Aside from the obvious residency restriction, the timing of the appointment is a fatal defect with respect to the requirements of *Bounds*. Because an inmate must already have filed his petition to have the matter of appointed counsel considered, he would not receive the attorney's assistance in the critical stages of developing

> his claims. *See Bounds, supra*, 430 U.S. at 828 n.17, 97 S.Ct. at 1498 n.17. Consequently, attorneys appointed pursuant to this statute are, by reason of the lateness of the appointment, unable to provide all of the required assistance.

668 F. Supp. at 515.

The District Court's finding is based on the fact that, in order to qualify for appointment of Virginia state habeas counsel, the Death Row inmate must: (1) prepare and file a petition, (2) survive a motion to dismiss, *and* (3) convince a court that the issues raised by the petition are "substantial" and require an evidentiary hearing. *Darnell v. Peyton*, 208 Va. 675, 160 S.E.2d 749 (1968). Indeed, the Senior Assistant Attorney General so testified. (Tr. 438)

Respondents' conjecture that counsel could theoretically be appointed prior to the evidentiary hearing is contrary to the evidence offered at trial. The record reveals six cases -- including one of the two instances Petitioners cite where counsel was in fact appointed -- in which the Commonwealth *opposed* appointment on grounds that it was contrary to Virginia law.[8] (Tr. 88, 143, 154, 248-49, 251-52; Px 33, 35) The Commonwealth has been quite successful in arguing that its adversaries should not have lawyers: The record provides evidence of Virginia state courts denying motions for appointment of post-conviction counsel at least three times (Tr. 91-92, 248, 251; Px 86), and Virginia federal courts also denying appointment three times. (Tr. 252)[9] The possibility that

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[8] Petitioners cite two instances (Px 34, Dx 17) in which Virginia Circuit Courts appointed lawyers to represent Death Row inmates prior to the evidentiary hearing. In one of these examples, however, counsel was not in fact appointed until after the petition was filed. (Px 34, 35) In any event, these purported examples serve only to underscore the inadequacies of what the Commonwealth offers. In fact, the Death Row inmates already had *volunteer* counsel; the courts merely appointed the volunteer lawyers. (Tr. 104, 248-50; Px 35) This provides little solace to an unrepresented inmate who, because he cannot find a volunteer lawyer in the first place, has no counsel who will seek appointment.

[9] As the Virginia Supreme Court has confirmed, appointment under § 14.1-183 is at all times wholly discretionary. *Darnell*, 160 S.E.2d at 750; *Howard v. War-*

a Death Row inmate may, through defeating the Commonwealth in a litigated motion, *win* himself an attorney can seem only a cruel joke to inmates such as Messrs. Washington, Clark, Poyner, and Closa, who could never have sustained their own cases long enough to earn themselves lawyers.

Most importantly, as this Court held in *Bounds*, the possibility of appointment of counsel under this statute is simply irrelevant. "Since our main concern here is 'protecting the ability of an inmate to prepare a petition or complaint,' *Wolff v. McDonnell*, 418 U.S. at 576, it is irrelevant that [the state] authorizes the expenditure of funds for appointment of counsel in some state post-conviction proceedings for prisoners whose claims survive initial review by the courts." *Bounds*, 430 U.S. at 828 n.17.

C. Volunteer Attorneys Are Not Available in Virginia To Meet the Needs of Death Row Inmates

Having found that Virginia lacks a system for providing counsel to indigent Death Row inmates, Judge Merhige considered whether volunteer lawyers are available to assume post-conviction representation. He found that they are not:

> The evidence conclusively establishes that today few -- very few -- attorneys are willing to voluntarily represent death row inmates in post conviction efforts.... In view of the scarcity of competent and willing counsel to assist indigent death row inmates in their exercise of seeking post conviction relief, some relief is both necessary and warranted.

668 F. Supp. at 515.

The consequence is that inmates are now going without post-conviction lawyers for extended periods of time. The effect of such delays, Judge Merhige found, "may be devastating." 668 F. Supp. at 515 n.2. And, as previously outlined, the volunteer system completely failed with regard to Earl Washington.

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den, Buckingham Correctional Center, 232 Va. 16, 348 S.E.2d 211, 213 (1986). Thus, due to its untimely and unsure application, this system is a far cry from providing assurance of meaningful access to Death Row inmates.

Thus, if Virginia's Death Row inmates are left to rely solely on volunteer counsel, there can be no meaningful access -- and no post-conviction review -- for them.

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In sum, there is no system whatsoever in place in Virginia that assures indigent Death Row inmates meaningful access to the courts for state post-conviction proceedings. Relief in the form ordered by Judge Merhige was thus wholly warranted:

> The matter of a death row inmate's habeas corpus petition is too important -- both to society, which has a compelling interest in insuring that a sentence of death has been constitutionally imposed, as well as to the individual involved -- to leave to, what is at best, a patchwork system of assistance. These plaintiffs must have the continuous assistance of counsel in developing their claims.

668 F. Supp. at 515.

REASONS FOR DENYING THE WRIT

This case, which presents none of the considerations customarily required to warrant Supreme Court review, is a particularly inappropriate candidate for the exercise of this Court's certiorari jurisdiction. The Fourth Circuit's *en banc* decision conflicts neither with any decision of this Court nor with the decision of any other Court of Appeals. Although the courts below painstakingly applied the principles and reasoning of *Bounds* and its progeny, the Fourth Circuit is the *first* federal appellate court to consider the access to the courts that any state provides its Death Row inmates for post-conviction proceedings. Moreover, this case falls squarely within the "two- court rule": Underlying all the arguments in the Petition is the objective that this Court review and overturn explicit findings of fact adopted by the District Court and fully endorsed by the Fourth Circuit. Finally, Petitioners ask this Court to exercise its certiorari jurisdiction to make a broad *per*

se ruling that counsel may *never* be required in any situation as a remedy for a constitutional violation.

It is the Petition, not the decisions below, that is based on sweeping generalizations and across-the-board assumptions; it is Petitioners, not Respondents, who advocate a new, nationwide, *per se* constitutional rule. The writ should be denied.

I. THIS CASE RAISES NO ISSUE RIPE FOR SUPREME COURT CONSIDERATION

Petitioners urge that the Fourth Circuit's decision -- which concerns the lack of legal assistance provided to *Virginia's* Death Row inmates in light of *Virginia's* willingness to execute these unrepresented inmates -- is such an "unprecedented intrusion" into all states' post-conviction proceedings that it warrants this Court's review. (Pet. at 14) Yet, although provision of representation is of life or death significance to the Death Row inmates, it is by no means apparent that the Fourth Circuit's decision will have the "radical" effect throughout the country -- or even in Virginia -- that Petitioners predict. (*See id.*)

The District Court found, based on the evidence offered at trial, that provision of lawyers prior to, rather than following, the filing of a state habeas corpus petition requires "only a slight modification of the current assistance." 668 F. Supp. at 515. The court, in its Final Judgment Order, gave Petitioners free rein to "develop a system" to implement the relief ordered. 668 F. Supp. at 517. Petitioners have been free to address any "sweeping generalization" or "across-the-board assumption" regarding the application of the order in this implementation stage. (*See* Pet. at 9) Yet, Petitioners have made *no* attempt to develop *any* type of system. Thus, Petitioners have failed to demonstrate the actual, as opposed to hypothetical, impact of the Fourth Circuit's decision on Virginia.

Petitioners' prophecy regarding the decision's national impact is equally speculative. Virginia is exceptional in its adamant refusal to address Death Row inmates' lack of representation and in its readiness to execute the unrepresented. The federal government, other states, and state and federal courts have, unlike Virginia, acknowledged that Death Row inmates must receive the assistance of lawyers in order to have access to post-conviction proceedings.

Congress and the federal judiciary have begun to address the problem through a variety of measures. Both the Senate, in S.2455, and the House of Representatives, in H.R.5210, recently passed bills providing for *mandatory* appointment of counsel for state Death Row inmates pursuing federal habeas corpus remedies. The House has also provided for the automatic appointment of counsel for petitions for writ of certiorari in federal capital prosecutions. Similarly, federal district courts are beginning to adopt rules providing for the *mandatory* pre-petition appointment of counsel to state Death Row inmates pursuing federal habeas corpus relief. *See* General Order No. 30 of the Northern District of California (adopted May 1988); Local Rule No. 191 of the Eastern District of California (adopted June 1988). In addition, the Judicial Conference has approved the federal funding of resource centers "solely for the purpose of providing *representation*, assistance, information, and appropriate other services in connection with federal death penalty habeas corpus cases" brought by state Death Row inmates. *Guidelines for the Administration of the Criminal Justice Act (18 U.S.C. 3006A)* App. D-2 (May 20, 1988)(emphasis added). At least three such resource centers -- in Tennessee, Georgia, and Louisiana -- have already been funded. Finally, this Court has recently appointed former Justice Lewis Powell to head a commission to study capital post-conviction proceedings.

States having the death penalty, other than Virginia, have likewise begun to address the question. Florida, with one of the largest Death Rows in the country, has established by statute the Office of the Capital Collateral Representative to provide actual representation in *all* capital post-conviction proceedings. Fla. Stat. Ann. § 27.7001. Oklahoma and Indiana have comparable offices. *See* Okla. Stat. Ann. tit. 22, §§ 1089, 1360. This past summer, the North Carolina General Assembly appropriated $191,505 for the operation of a Death Penalty Resource Center

providing assistance in post-conviction proceedings. 1987 N.C. Sess. Laws (Reg. Sess. 1988) ch. 1086, Sec. 109. In addition, the legislatures of Georgia, Tennessee, and South Carolina have, along with the federal government, funded resource centers in those states.

The evidence at trial revealed that a number of states, including Ohio, Illinois, New Jersey, and Connecticut, have authorized their public defender offices to set up special capital post-conviction programs to provide representation or support. (Tr. 43) Other states -- Kentucky, Maryland, Nevada, and New Mexico -- have public defender offices that have actually represented Death Row inmates in post-conviction proceedings. Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 American University Law Review 513, 558-61 (1988). Wyoming's state-wide public defender office is under order from the state supreme court to represent Death Row inmates throughout post-conviction proceedings. *Id.* at 561.

Since numerous states -- as well as various branches of the federal government -- have just begun to examine the issue seriously and to experiment with alternatives, and since no other Court of Appeals has yet had an opportunity to consider the legal assistance provided by any other state to its Death Row inmates in post-conviction proceedings, this issue is not yet ripe for Supreme Court review. As Justice Stevens wrote, concurring in the denial of certiorari in *Perry v. Louisiana*, 461 U.S. 961 (1983):

> I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. There is presently no conflict of decision within the federal system. . . . In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.

Id.

II. THE DISTRICT COURT'S DECISION WAS A CONVENTIONAL APPLICATION OF *BOUNDS V. SMITH*

As Petitioners acknowledge, this Court in *Bounds v. Smith*, 430 U.S. 817, 828 (1977), emphatically reaffirmed that inmates have a "fundamental constitutional right of access to the courts." (Pet. at 5) In attempting to show that the opinions below are some grotesque extension of *Bounds* warranting "summary reversal" by this Court, however, Petitioners argue that *Bounds* was more concerned with form than substance: Petitioners contend that if a state provides a law library, then all other inquiry (such as whether that library in fact provides meaningful access) ceases. Consistent with their extraordinarily narrow interpretation of *Bounds*, Petitioners claim that they have only "a limited obligation" to provide assistance to inmates. (Pet. at 5) This limited obligation, they argue, can *never* -- under any circumstances -- require that they provide an inmate with counsel. (*Id.* at 5-7)

Neither this Court nor any of the courts construing *Bounds* has ever embraced Petitioners' formalistic interpretation of the right of access to the courts. In fact, *Bounds* and its progeny squarely and explicitly reject Petitioners' approach in favor of an analysis that focuses on whether a State's program of assistance *in fact* provides meaningful access to the courts for all prisoners, including those with special handicaps and circumstances. *See, e.g., King v. Atiyeh*, 814 F.2d 565, 568 (9th Cir. 1987)("There is no established minimum requirement that a state must meet in order to provide indigent inmates with adequate access to the courts. Instead, a reviewing court should focus on whether the individual plaintiff before it has been denied meaningful access."). This is precisely the analysis applied by the Fourth Circuit in this case.

This Court emphasized in *Bounds* that mere "access to the courts" is not enough. That access must be "adequate, effective, and meaningful," and it must extend to "*all* prisoners." *Id.* at 822, 824 (emphasis added). Indeed, *Bounds* specifically distinguished "the access rights of ignorant and illiterate inmates . . . unable to present their own claims in writing to the courts" from those of "in-

mates able to present their own cases." *Id.* at 823-24. As an example, this Court noted that for illiterate inmates, a law library alone is not enough -- meaningful access "required *at least* allowing assistance from their literate fellows." *Id.* (emphasis added).

Subsequent to *Bounds*, courts have applied this Court's common-sense view and recognized that there are classes of inmates whose special circumstances require that they receive more than the minimum assistance permitted by *Bounds* -- a law library -- in order to achieve meaningful access. *See, e.g., Cruz v. Hauck*, 627 F.2d 710, 721 (5th Cir. 1980)(emphasis original) (holding that "[l]ibrary books, even if 'adequate' in number, cannot provide access to the courts for those persons who do not speak English or who are illiterate," and ordering the district court to "look at all the circumstances to determine whether *all* inmates have meaningful access to the courts"); *Valentine v. Beyer*, 850 F.2d 951, 956-57 (3rd Cir. 1988) (affirming district court's order prohibiting the state from closing a paralegal clinic, based on the district court's factual findings regarding the assistance provided by the clinic, the inadequacy of the State's proposed plan, and the special needs of closed custody, illiterate, and non-English speaking inmates); *Knop v. Johnson*, 655 F. Supp. 871, 882 (W.D. Mich. 1987)("A court, rather, must measure the adequacy of defendants' system of legal access by the inmates' ability to gain access to the courts through that system. In this case, plaintiffs [illiterate inmates] have established a credible claim that they are not able to gain adequate, effective, and meaningful access to the courts through defendants' system.").

The District Court in this case similarly made factual findings regarding (1) the special -- indeed unique -- handicaps that hinder Virginia's Death Row inmates from challenging their death sentences, (2) the adequacy of legal assistance available to these inmates, and (3) what legal assistance they require in order to have adequate, effective, and meaningful access to the courts for pursuing post-conviction remedies. Based on these factual findings, the District Court and the Fourth Circuit (*en banc*) concluded that the assistance Petitioners provided (although sufficient for inmates in the general population) did not ensure this special class of inmates meaningful access to post-conviction remedies.

Petitioners' real dissatisfaction with the decisions below is not the courts' application of the *Bounds* principles, but rather their remedy -- even though district courts generally have broad discretion to fashion remedies to correct constitutional violations *and even though* the District Court below expressly delegated much discretion to Petitioners themselves. *See Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978)("Once invoked, 'the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'"). In the face of this broad discretion, Petitioners argue that a court may *never*, under any circumstances, devise a remedy for a *Bounds* violation that requires the state to develop a system for providing legal assistance in the form of lawyers.

The courts construing *Bounds*, however, have not adopted Petitioners' rigid rule, but rather have ordered the provision of lawyers when the special circumstances of the plaintiffs required it. *See, e.g., Smith v. Bounds*, 841 F.2d 77, 77-78 (4th Cir. 1988) (en banc) (affirming district court's order requiring prison legal services when, after a 10-year period, the court found that "North Carolina was unable or unwilling to implement its library plan consistent with minimum constitutional requirements."); *Hadix v. Johnson*, No. 80-73581, 1988 West Law 81732 (E.D. Mich. July 1, 1988) (requiring prison legal services program for illiterate inmates and those in segregation and for other inmates because state failed to provide adequate law library); *Canterino v. Wilson*, 562 F. Supp. 106, 112 (W.D. Ky. 1983) (requiring prison legal services for women inmates because they "do not have a history of self-help in the legal field"); *Gilmore v. Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd*, 404 U.S. 15 (1971) ("In some contexts [meaningful access] has been interpreted to require court-appointed counsel for indigents.").

Thus, far from conflicting with all the other Courts of Appeals, as Petitioners suggest,[10] the Fourth Circuit's carefully cir-

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[10] Petitioners' string-cite of supposedly conflicting decisions (Pet. at 6) cannot survive scrutiny. Not one of these decisions involves Death Row inmates and their

cumscribed decision is utterly consistent with the approach taken by other federal courts in applying *Bounds*. Certainly there is no direct conflict between the decision in this case and any other decision: This is the *first* time a federal appellate court has ruled on the assistance necessary to provide Death Row inmates with meaningful access to post-conviction remedies.

Only a month ago, however, the Third Circuit, in remanding for further findings of fact as to Death Row inmates' access generally, reached a conclusion essentially identical to that of the Fourth Circuit:

> [T]he Court in *Bounds* did not suggest that the right of access to the courts is always to be measured by a single standard irrespective of the nature of the proceedings. It may well be that the scope of access to legal resources required under *Bounds* varies according to the proceeding. In proceedings directly implicating the validity of a death-sentenced prisoner's conviction, the availability of legal assistance from lawyers, rather than from other sources of legal knowledge, is more central to the vindication of prisoners' claims than in other civil claims filed by a death-sentenced prisoners, such as, for example, those complaining of conditions of confinement.

Peterkin v. Jeffes, No. 87-1312, 1988 West Law 86503 at 23 (3d Cir. Aug. 23, 1988). This case, of course, involves *only* the unique circumstances of Virginia's death-sentenced prisoners' right to pursue post-conviction proceedings once -- proceedings that will for them be the difference between life and death.

Thus, the decisions of the District Court and the Fourth Circuit fall squarely within mainstream *Bounds* analysis. This case

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unique plights. They involve only the access of *general population* inmates. Moreover, most of the cited cases do not even address the question whether the remedy of lawyers is ever appropriate. *See, e.g., Carter v. Fair*, 786 F.2d 433 (1st Cir. 1986) (inmates offered no substantive evidence that *lawyer* assistance program failed to provide meaningful access); *Spates v. Manson*, 644 F.2d 80 (2d Cir. 1981) (*public defender* services providing actual representation sufficient under *Bounds*).

does not involve Respondents seeking an exceptional extension of *Bounds*, but rather Petitioners demanding an unwarranted constriction of *Bounds*.

III. THIS COURT SHOULD NOT EXERCISE ITS CERTIORARI JURISDICTION TO REVIEW THE FINDINGS OF FACT FOUND CONCURRENTLY BY THE DISTRICT COURT AND THE COURT OF APPEALS

Essential to the Petition is Petitioners' and dissenting Judge Wilkins's dispute with the factual findings of the District Court -- findings the Fourth Circuit held were not clearly erroneous. Petitioners urge this Court to exercise its certiorari jurisdiction to engage in the same activity that necessitated the vacatur of the panel decision: appellate fact finding.

Indeed, Petitioners openly state: "Both the district court and the Fourth Circuit majority relied on the *erroneous* conclusion that appointment of counsel to represent inmates was available under state law only after a petition raising non-frivolous claims was filed." (Pet. at 10; emphasis added) As a second example, Petitioners contend that Death Row inmates have "access to legal information and assistance" through law libraries and institutional attorneys (Pet. at 3), although the Fourth Circuit found that Death Row inmates at two of Virginia's three Death Row prisons "are not permitted to visit the libraries," and the District Court found that "[n]o pretense is made by the Defendants in this case that these few [institutional] attorneys could handle the needs of death row prisoners in addition to providing assistance to other inmates." 847 F.2d at 1119; 668 F. Supp. at 514. As a third example, Petitioners contend that "[a]ll Death Row inmates in Virginia have had the assistance of an attorney, whether volunteer or court appointed, in pursuing state habeas corpus remedies" (Pet. at 3, 10 n.4), yet they are forced to concede that, at the time of the trial below, "one inmate did not then have counsel." (Pet. at 2) Indeed, the District Court found that the days when lawyers would volun-

teer to represent a Death Row inmate *pro bono* "are gone." 668 F. Supp. at 515.[11]

Remarkably, Petitioners' sole acknowledgment of the District Court's findings of fact is relegated to a footnote. (Pet. at 10 n.1) No explanation is offered as to how they are so clearly erroneous as to require this Court to conduct the same appellate fact-finding in which the Fourth Circuit, acting *en banc*, refused to engage. In fact, the Fourth Circuit, in holding that the District Court's findings of fact were not clearly erroneous, properly exercised its appellate role by refusing to retry the case. *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."); *Amadeo v. Zant*, 108 S.Ct. 1771, 1780 (1988) (A court of appeals may not "engage in impermissible appellate fact finding").

The usual practice of this Court is to "accord great weight to a finding of fact which has been made by a district court and approved by a court of appeals." *N.C.A.A. v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984). Indeed, "this court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank and Manufacturing Company v. Linde Air Products Company*, 336 U.S. 271, 275 (1949). This case should be no exception.

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[11] Petitioners' extensive argument that "death is not different" as a matter of law (Pet. at 8-11) is likewise a transparent attempt to circumvent the District Court's factual findings that the fact of being on Virginia's Death Row results in unique restraints on an inmate's ability to exercise his right to access to the courts for post-conviction proceedings in an adequate, effective, and meaningful manner.

IV. THE DECISIONS BELOW DO NOT CONFLICT WITH THIS COURT'S RECENT DECISION OF *PENNSYLVANIA V. FINLEY*

Throughout their Petition, Virginia's officials accuse the Fourth Circuit and the District Court of "creat[ing] a new right to counsel." (Pet. at 4, 6, 8, 9, 11, 12, 14) In fact, it is Petitioners who have manufactured the "right to counsel" concept. Other than where quoting Petitioners, this term appears neither in the *en banc* opinion nor in the district court memorandum.

Petitioners' mischaracterization of the lower courts' decisions as creating law is ironic. Petitioners themselves want this Court to make new law by extending *Pennsylvania v. Finley*, 107 S.Ct. 1990 (1987), to outlaw provision of post-conviction counsel as a remedy available to federal courts.

In *Finley*, as the Fourth Circuit recognized, this Court held that the procedural framework of *Anders v. California*, 386 U.S. 738 (1967), does not apply to Pennsylvania post-conviction lawyers seeking to withdraw from representation. 847 F.2d at 1121. This Court based its decision on there being no "constitutional *right to counsel*" for post-conviction proceedings. 107 S.Ct. at 1993 (emphasis added).

Finley did not address whether provision of post-conviction representation would in every conceivable situation be an impermissible *remedy* for a federal court. Yet the adoption of such a construction is precisely what Petitioners urge. Merely by characterizing any remedial order providing representation as "creating a new right to counsel," Virginia and other states can similarly oppose -- no matter what the facts -- every potential judicial determination that such relief might be warranted.

As an example of such a remedial order, the Fourth Circuit found, in a later proceeding in *Bounds* itself, that North Carolina had engaged in "a decade-old pattern of neglect and delay" to ignore or circumvent this Court's 1977 *Bounds* decision. 813 F.2d 1299, 1304-05 (4th Cir. 1987), *opinion adopted en banc*, 841 F.2d 77 (4th Cir. 1988). Because North Carolina had failed to provide meaningful access through adequate law libraries, the Eastern

District of North Carolina ordered the remedy of providing North Carolina's prisoners with a prison legal services program. In affirming, the Fourth Circuit certainly did not address whether *Finley* divested federal courts of their powers to fashion such relief.

Conversely, this Court did not mention *Bounds* in its *Finley* decision. Had this Court intended *Finley* to have the far-ranging preclusiveness Petitioners now urge, the Court would have had to address *Bounds*. Supreme Court decisions spawning more than 500 published opinions in the federal reporters are not overruled or substantially limited *sub silentio*.[12]

In sum, by unilaterally pasting a "right to counsel" label on a district court's remedy, Petitioners have attempted to fabricate a conflict with Supreme Court precedent. It would behoove them to consider what this Court said in *Finley*:

> Respondent apparently believes that a "right to counsel" can have only one meaning, no matter what the source of that right. But the fact that the defendant has been afforded assistance of counsel in some form does not end the inquiry for federal constitutional purposes. Rather, it is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls the constitutional question.

107 S.Ct. at 1997. The invocation of mere incantations is insufficient to justify exercise of this Court's certiorari jurisdiction.

V. PETITIONERS' PREDICTION THAT THE DECISION BELOW WILL SPUR "A POTENTIALLY ENDLESS SUCCESSION OF COLLATERAL PROCEEDINGS" DISREGARDS THE LAW

In their ardor to attract this Court's attention, Petitioners invoke the spectre of never-ending litigation creating "infinite delay" in carrying out executions. If the decision below stands, accord-

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[12] Moreover, interpreting *Finley* to limit *Bounds* creates an enormous anomaly. *Finley* only affects post-conviction proceedings, while *Bounds* provides an across-the-board right of access. Under Petitioners' theory, a court could find that lawyers were an appropriate *Bounds* remedy for illiterate prisoners who could not otherwise bring civil rights actions, draft wills, or file divorce papers, but *Finley* would preclude this same court from finding that a lawyer is necessary to obtain a stay of execution.

ing to Petitioners, not only will "protracted and repetitive litigation" result, but such litigation will manifest in "a potentially endless succession of collateral proceedings in which the petitioner invokes a right to counsel to challenge the effectiveness of the next previous attorney." (Pet. at 12) Petitioners have thus formulated the ultimate exaggeration of the rusty "floodgates" defense: infinite litigation.

Petitioners' hysteria over potentially "endless" post-conviction litigation to challenge the effectiveness of previous lawyers is unjustified. The possibility of such "infinite delay" no longer exists. Virginia has already jousted with this spectre -- and won.

A Virginia Death Row inmate cannot rely on the decisions below to argue that he has the right to effective assistance of counsel in a Virginia state habeas proceeding. When the late Richard L. Whitley tried to do exactly that, the Fourth Circuit held: "The sole question presented in this appeal is whether, in view of the case of *Giarratano v. Murray*, 668 F. Supp. 511 (E.D. Va. 1986), the performance of Whitley's attorneys in his state habeas petition should be judged by the constitutional standard of ineffectiveness of counsel. . . . *Finley* forecloses Whitley's contention on appeal." *Whitley v. Muncy*, 823 F.2d 55, 56 (4th Cir. 1987); *see also Finley*, 107 S.Ct. at 1994 ("it is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls" whether one has the right to "effective" assistance of counsel).

Mr. Whitley was executed four days after he invoked the District Court decision below to challenge the effectiveness of his post-conviction attorney. No Virginia Death Row inmate has tried this approach since. The next one to do so is unlikely to achieve any more "infinite delay" of his execution than did Mr. Whitley.

VI. THE ALTERNATIVE TO THE DECISIONS BELOW IS PERPETUATION OF CONFUSION AND DELAY

Petitioners themselves suggest that "[t]his Court is particularly aware of the confusion and delay that is now the hallmark of capital post-conviction litigation." (Pet. at 11) Petitioners urge that this "system" continue unaltered.

Virginia's "patchwork system of assistance" is but an incubator of confusion, misdirection, and, ultimately, delay. *See* 668 F. Supp. at 515. Petitioners advocate a "system" in which institutional attorneys who have never prepared capital habeas petitions are somehow held responsible for preparing all such petitions for Death Row, where Death Row inmates draft petitions for writ of certiorari for other Death Row inmates, where the attorney advising a Death Row inmate changes when the inmate is transferred from one prison to another, where inmates spend their final 15 days barred from any library, where a Death Row inmate is denied counsel in the same order that schedules his execution, and where (until recently) volunteer lawyers rush in at the last moment and submit hurriedly prepared papers asking for stays of execution.

The District Court's remedy of providing for legal representation at an early stage can only ameliorate, rather than compound, the confusion that is now the "hallmark" of capital post-conviction litigation in Virginia. Petitioners' own witness, the Coordinator of All Capital Litigation in the Commonwealth, completely agreed:

> Q. Why is that the position of the Attorney General's Office?
>
> A. Well, basically we want to see the inmate have an attorney at state habeas for reasons of economy and efficiency. When you have a death case, we recognize that it is going to be prolonged litigation. And we want to see all matters that the inmate or the petitioner wants to raise be raised at one proceeding, and we can deal more efficiently with an attorney. And we prefer that from an economy

> standpoint we don't have to have more than one proceeding.

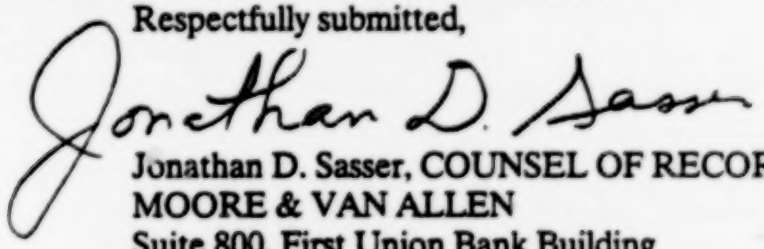
(Tr. 425-26)

In light of the fact that *Pennsylvania v. Finley* and *Whitley v. Muncy* bar Virginia's Death Row inmates from challenging the effectiveness of their post-conviction counsel, there is simply no factual or legal basis to conclude that the presence of a single lawyer throughout state habeas proceedings -- instead of an unrepresented Death Row inmate, or a volunteer who appears a few days before an execution date, or a series of volunteer lawyers -- "is certain to cause confusion." (*See* Pet. at 14) Indeed, it is the only hope for eliminating the confusion that now exists.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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